

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

APRIL TERM, 1939.

—
No. 7490.
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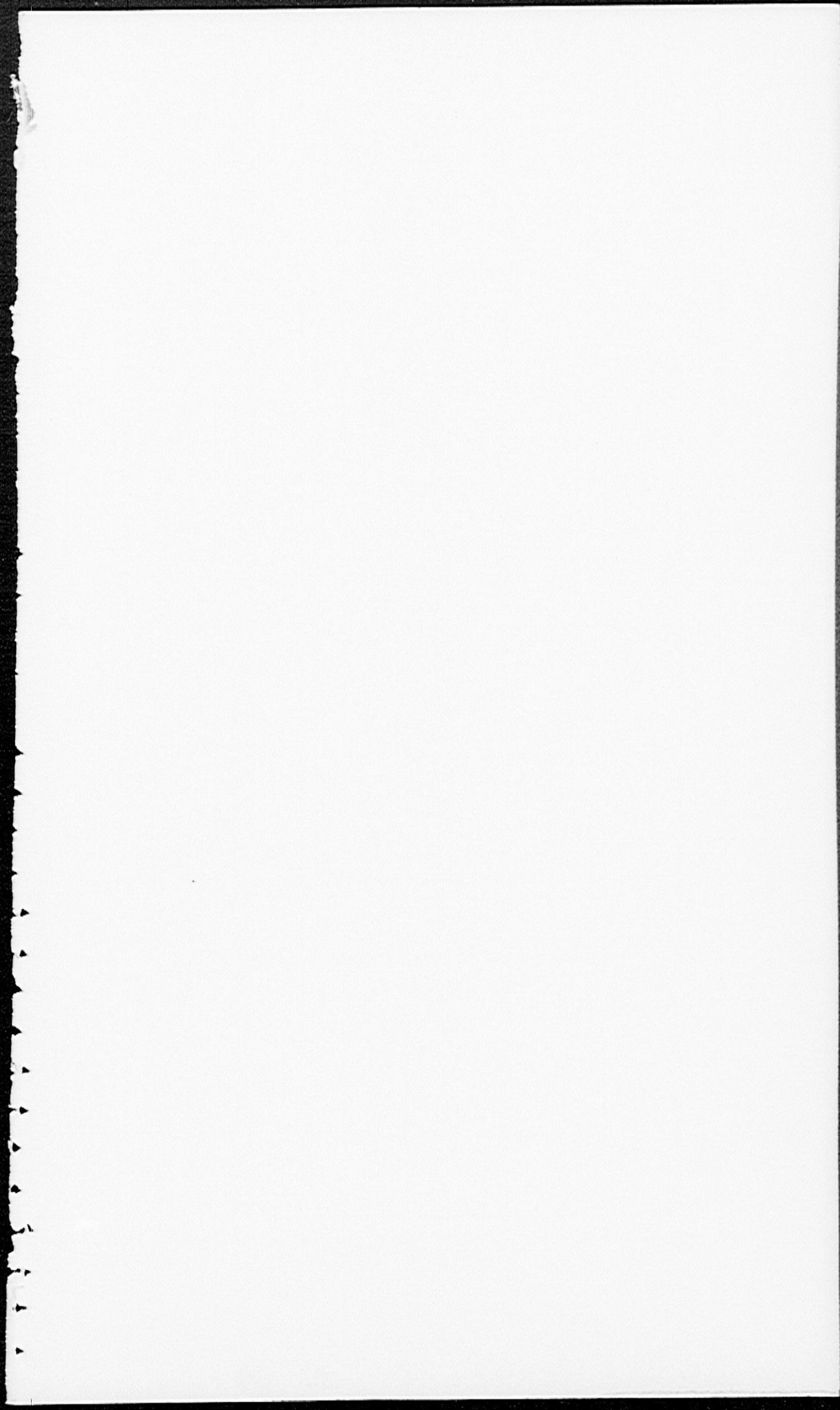
HARTFORD ACCIDENT AND INDEMNITY COMPANY, A CORPORATION, *Appellant*,

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER, AND RAY BRIDGES, *Appellees*.

—
BRIEF FOR APPELLANT.
—

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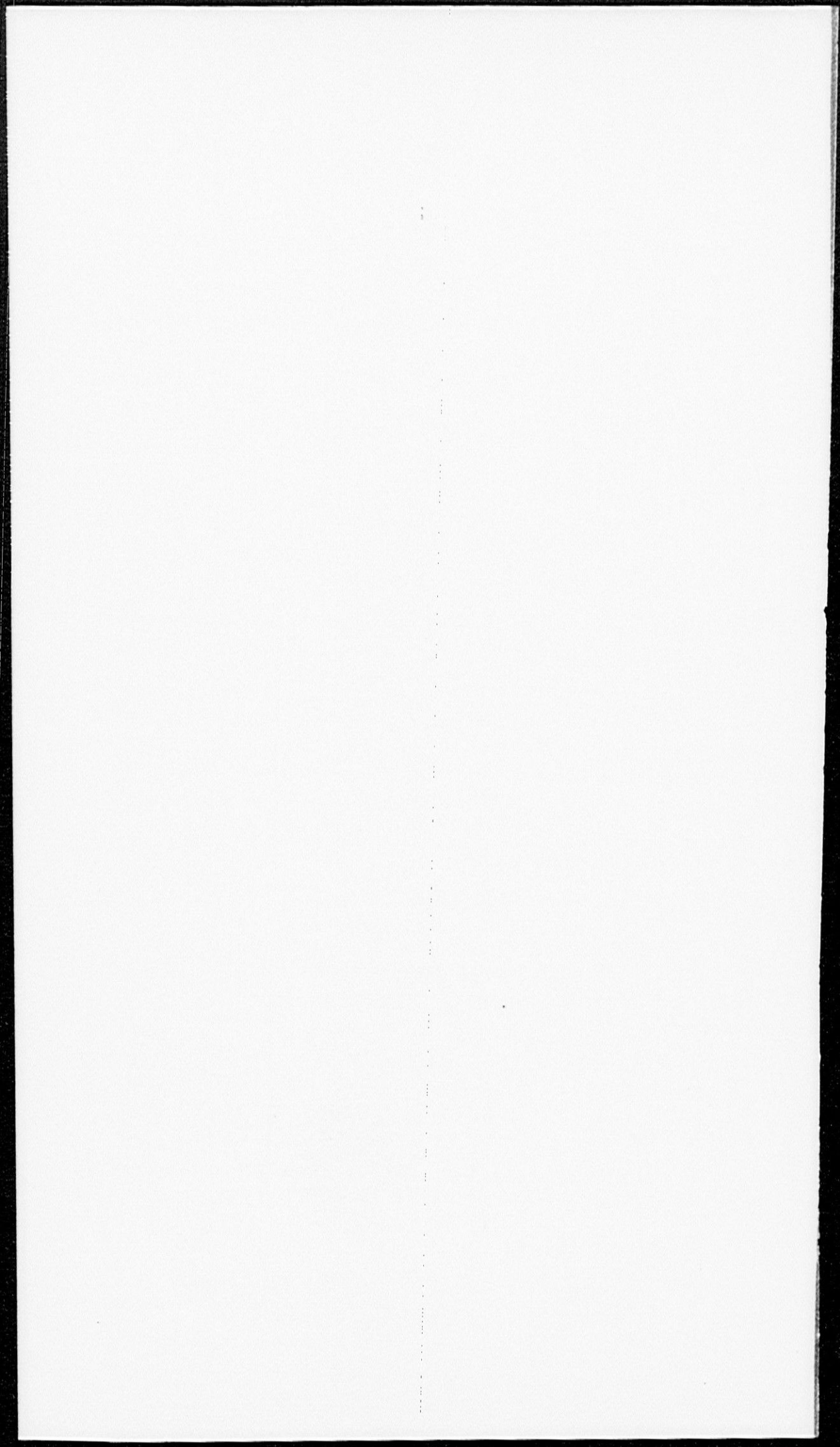
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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

APRIL TERM, 1939.

No. 7490.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, A CORPORATION, *Appellant*,

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER, AND RAY BRIDGES, *Appellees*.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

The judicial proceedings in the present case originated in the District Court of the United States for the District of Columbia where the appellant filed a complaint (R. 1-6) under authority of section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424; U. S. C., Title 33, Chapt. 18, Sec. 921 (b)), which was made applica-

ble to the District of Columbia by the Act of May 17, 1928 (45 Stat. 600, Chapt. 612, Sec. 1; D. C. Code (1930), Title 19, Chapt. 2, Sec. 11), seeking to have the court review and permanently enjoin the enforcement of the compensation order of April 13, 1939, filed by the appellee Frank A. Cardillo, awarding compensation to the appellee Ray Bridges (R. 7-8). On May 17, 1939, appellees Cardillo and Bridges filed a joint motion to dismiss the complaint (R. 43). On June 27, 1939, the Court entered a final decree granting the motion to dismiss (R. 44). It is from this final decree that the present appeal has been taken under authority of section 7 of the Act of February 9, 1893 (27 Stat. 434, Chapt. 74; D. C. Code (1925), Sec. 226), permitting appeals to be taken to the United States Court of Appeals for the District of Columbia from the decrees of the District Court of the United States for the District of Columbia.

STATEMENT OF CASE.

This case arises out of a compensation order filed on April 13, 1939, by Frank A. Cardillo, Deputy Commissioner, District of Columbia compensation district, United States Employees' Compensation Commission, awarding compensation to appellee Ray Bridges, who sustained injury on the 11th day of October, 1938, resulting in temporary total disability for a period of 4-2/7 weeks. This injury occurred while Bridges was working as a helper in the warehouse of the Sanitary Grocery Company, Inc., and whose liability for the payment of compensation is insured by the appellant, Hartford Accident and Indemnity Company (R. 2-6). The said compensation order was issued by the Deputy Commissioner pursuant to the provisions of the com-

pensation law in force in the District of Columbia; namely, the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424); U. S. C., Title 33, Chapt. 18, Secs. 901, *et seq.*), as made applicable to the District of Columbia by the Act of May 17, 1928 (45 Stat. 600, Chapt. 612, Sec. 1; D. C. Code (1930), Title 19, Chapt. 2, Sec. 11).

A hearing on Bridges' claim for compensation for disability resulting from said injury was held before the Deputy Commissioner on April 6, 1939 (R. 9), and the compensation order of April 13, 1939, was based upon the evidence adduced at said hearing. At this hearing Bridges testified that he was a helper in the warehouse at Sanitary Grocery Company, Inc., and that on the morning he was injured he went to work at one-thirty, and that one Roy Downey was a checker in the warehouse and would call out certain articles to be placed on the truck and that after they were placed on the truck by Bridges they were checked off the list by Downey (R. 12), and while he was loading a basket of kale on the truck Downey came from back and struck him on the face (R. 13) and Bridges then stated that he was going to report it to his boss, a Mr. Frowenfellow (R. 14), and that his boss sent him to Dr. Becker. The Deputy Commissioner took over the examination of Bridges, and the following proceedings were had (R. 16 & 17):

“Q. What day of the week did the injury occur?

A. On Monday, the 10th.

Q. You are talking about the Saturday before?

A. Yes. We both had watches, I had a Hamilton and he had a Bulova. On Monday morning he started kidding about it, we were kidding about it, it just went on, and I laughed about it, and he got mad because I laughed. He made the remark

to other boys that I thought that anything that I had was better than what anybody else had.

This started over the watches, we were kidding over the watches.

Q. Do you know of any other topic of discussion at that time between you and Downey that might have led to ill feeling on his part? A. No, that is all I can say.

Q. It was just a playful bantering or discussion between the two of you as to who had the better watch? A. Yes, and it seemed like he got a little angry because I laughed it off.

Q. What caused you to think that he was getting angry? A. I could tell because he changed off of everything. After we quit talking about watches, he started kidding me about my size.

By the Deputy Commissioner:

Q. When did this take place? A. On that same morning.

Q. That started on Monday? A. On Monday, yes. He was going on about my size being so small, and I told him that I couldn't help it about my size, and I told him that I thought it was ignorant for a man to go on about a person's size. I told him that I couldn't help it, and he got angry.

When I knew he was getting angry I didn't say anything more up until he struck me.

On cross-examination Bridges admitted that Downey and he had been discussing the watches for two months, and also that when he was called "shorty" by Downey that he informed Downey that he thought anyone was a little touched in the head to talk about anyone's size, and that he thought it was ignorant of a person to say anything about a fellow's size, but denied that he cursed Downey at that time (R. 19), and on cross-examination of Bridges is the following (R. 20):

"Q. Did there come a time when you told Downey that you would take a knife out of your pocket and cut his guts out. A. No, I didn't tell him that.

Q. Was there any argument that took place over your work there at the plant with Downey? A. I don't recall that there was.

Q. This argument started over watches and the calling of you by Downey 'shorty'; is that right? A. That is right."

Roy Edwin Downey, called as a witness on behalf of the appellant (R. 28), testified that the argument preceding the fight was caused as follows (R. 29):

"We were kidding one another, I was calling him 'Shorty' and he was calling me 'Skinney,' and we kidded on like that, and we got to the other end of the building and he said to me, 'Only an ignorant son of a bitch would make fun of anybody's size.'

I says to him, 'What do you mean by calling me an ignorant son of a bitch?'

And he said, 'You know what I mean, you ignorant son of a bitch, and if you don't quit kidding me I will take my knife out and cut your guts out.'

Those were the very words that he used, and at that time he had a knife in his pocket.

Q. Did he say anything to you in reference to that knife? A. What?

Q. Did he threaten you in any way with that knife? A. No, he didn't pull it out, I didn't give him a chance to pull it out.

Q. Did he say anything more to you? A. No, just what I told you, first he called me an ignorant son of a bitch, and when I asked him what he meant by calling me that, he said that he would take his knife out and cut my guts out.

Q. What did you do then? A. I hit him.

Q. What did you hit him with? A. My fist.

Q. At that time were you facing him? A. I was facing him, yes, he was looking right at me—he didn't have any kale in his hands like he said he did.

Q. When you went up to him, did you go up to him for the purpose of having him apologize for what he said? A. Yes, I thought that is what he was going to do, apologize for calling me a son of a bitch.

Q. Then what did he do? A. He called me the same thing over again.

Q. Had you started checking at that time? A. Yes, we had.

Q. This argument which took place between you and Bridges didn't have anything to do with your work? A. No. I was calling him 'Shorty' and he was calling me 'Skinney,' we were just kidding, and he didn't like to be called 'Shorty,' but he was calling me 'Skinney,' so it was tit for tat.

John Rogers, called as a witness for the appellant, testified in part as follows (R. 34-35):

“Q. Did you hear the conversation which took place between the two? A. Well, Downey was calling Bridges 'Shorty' and Bridges was calling Downey 'Skinney;' that is all I know.

Q. What happened after that, how did the fight start? A. Bridges seemed to lose his temper or something, and he called Roy a son of a bitch, and Roy asked him what he meant, and Bridges repeated it again and said that he was going to cut his guts out, and he hadn't any more than said that before Roy hit him.

Q. How close were you standing to them at that time? A. Between three and four feet, not more than that; I was working right along with them.

Q. Do you know whether you saw Mr. Bridges that morning with a knife in his pocket? A. I can't say that I did.

Q. Do you know whether or not he reached in his pocket for a knife when he said, 'I will cut your guts out'? A. No, I cannot."

On April 27, 1939, the appellant, Hartford Accident and Indemnity Company, filed a complaint in the District Court, seeking to have the Court review and permanently enjoin the enforcement of said compensation order (R. 1-8). The complaint set forth in substance that the findings of fact of the Deputy Commissioner, and the compensation order of April 13, 1939, to the effect that the injury to Ray Bridges arose out of and in the course of his employment, are not substantiated by the evidence taken before the Deputy Commissioner, and contained in the transcript, and which is now a part of the record (R. 9-42), and the said Frank A. Cardillo had no evidence upon which he might properly make his findings of fact and award (R. 7-8).

On May 17, 1939, the appellees, Cardillo and Bridges, filed a joint motion to dismiss the complaint (R. 43) and on June 27, 1939, the Court entered a final decree granting said motion (R. 44). It is from this order that the present appeal has been taken.

STATUTE INVOLVED.

This case involves the application of part of subdivision (2) of section 2 of the Act of March 4, 1927 (44 Stat. 1424, 1425; U. S. C., Title 33, Chapt. 18, Sec. 902 (2)), which subdivision reads as follows:

SEC. 2. When used in this Act—

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or in-

fection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

STATEMENT OF POINTS.

1. That the finding of the Deputy Commissioner, that the injury sustained by Bridges arose out of and in the course of his employment, is not sustained by the evidence.

2. That the District Court was in error in dismissing appellant's bill of complaint.

SUMMARY OF ARGUMENT.

1. It definitely appears that the appellee Bridges was injured by reason of an argument which arose over the personal differences between himself and a co-employee, and that Bridges did not sustain an accidental injury which arose out of and in the course of his employment.

2. That the record contains no evidence upon which the Deputy Commissioner could fairly and reasonably draw a conclusion that the injury sustained by Bridges arose out of and in the course of his employment, and that the District Court was in error in sustaining the motion to dismiss.

ARGUMENT.

It is the contention of the appellant that the record of the testimony taken before the appellee Frank A. Cardillo, Deputy Commissioner (R. 9-42), clearly indicates that the injury sustained by appellee Bridges grew out of a personal altercation with one Downey, a

co-employee, and that Bridges did not sustain an accidental injury within the contemplation of the Workmen's Compensation Act.

It is not necessary to read all the testimony taken before the appellee Frank A. Cardillo, for it is all summed up in the testimony of the appellee Bridges, in the following question and answer which was put to and answered by the appellee Bridges (R. 20):

“Q. This argument started over watches and the calling of you by Downey ‘Shorty’; is that right?
A. That is right.”

That the fight between Bridges and Downey originated over personal animosity between the two, and which had no relation to their employment. Bridges denied that he called Downey any vile names but merely that the argument was over the question of the relative merit of watches and the fact that Downey called him “shorty”, whereas Downey stated that Bridges called him a vile name and when he asked him to retract it he reiterated his statement (R. 29) and this is confirmed by a fellow employee (R. 34-35).

In the case of *Paul R. Wimmer v. Hoage et al.*, 67 Appeals D. C. 128, 95 Fed. (2nd) 83, Chief Justice Groner stated as follows:

“The English Courts have considered the words—arising out of and in the course of his employment—as not including injuries resulting from a piece of iron thrown in anger by a boy in the same service; *Armitage v. Lancashire R. R. Co.*, 2 K. B. 178 (1902) or from a felonious assault of the employer; *Blake v. Head*, 106 L. T. N. S. 822, 28 Times L. P. R. 321.”

In the case of *Griffin v. Robertson*, 162 N. Y. Supp. 313, the Court said:

“Mr. Justice Lyon has with much care and labor collated many cases bearing on the question of the right of an employee to compensation. Most of them are cases where the accident arose as the result of horse play or sportiveness. It has generally been held in such cases that acts arising therefrom are outside the scope of the employment. The case at bar is very similar in its essential and controlling features to the case of an accident arising out of horse play. Diametrically opposite motives, it is true, occasion the injurious acts in the two classes of cases; but in both classes of cases the purpose is to gratify a personal desire. In one class of cases the motive is a spirit of frivolity or playfulness. In the other the motive is anger, animosity or vindictiveness. But in both the purpose is not to serve the master's interest, but to serve a momentary personal emotion of the employee. Whether the stirring of the mind be due to sportiveness or to vindictiveness, it is in both cases personal to the employee, and the purpose of the act which brings about the injury is to serve that impulse of the employee, and such act neither in fact does, nor is it intended to, subserve the interest of the master, nor is it in any proper sense incidental thereto.”

In the De Fillipi case, it was said:

“A test spoken of in the case of *Plumb v. Cobden Flour Mills Co. Ltd*, 7 B. W. C. C. 1, as a sound and convenient test in determining whether the injury arose out of the employment, is whether it is in the scope or sphere of the employment. The injury in the case at bar was not a peril of the service, nor was it reasonably incidental to the employment. It was not an assault which had its origin in the nature of the employment, nor was it in any way whatever connected with the master's work.”

In *Goldhirsch v. American Character Doll Co.*, 238 N. Y. Supp. 521, the Court said:

"It is not enough that the assault was committed while the plaintiff was doing the master's work. It must also be shown that it was the result of the prosecution of the master's work. An employee may be seated at his work bench doing his work when assaulted. This fact alone would not entitle him to compensation under the statute. But if it is proven that he was assaulted while there was a controversy as to how the work should be done, then I think there would be supplied the essential fact that this injury arose out of the employment."

In *Hertz v. Ruppert*, 218 N. Y. 148, 112 N. E. 750, the Court held that the injury received to be compensable under the Statute must be one which was suffered: (a) while the workman is doing the duty he is employed to perform and (b) as a natural incident of the work. It must be a risk connected with the employment and flowing therefrom as a natural consequence and directly connected with the work.

In *Edelweiss Gardens v. Industrial Commission*, 290 Illinois 462, 125 N. E. 260, the Court held:

"An award cannot be sustained for an injury to a restaurant waiter received in a fight with another employee, where the evidence does not show that the altercation had any connection with the employment but is as consistent with the theory that the quarrel was the result of a personal feud, as it is with the theory that it grew out of a dispute concerning the business."

In *Kimber v. Black and White Cab Co. Ga.*, 50 Georgia Apps. 148, 177 S. E. 275, it was held that an injury received by claimant as a result of and during

a fight with a fellow employee, arising over the manner in which claimant performed the duties of his employment, which fight was precipitated by claimant's using strong language towards his coemployee, is not compensable under the Workmen's Compensation laws.

These cases definitely show that it is necessary for the appellee Bridges to introduce some evidence upon which the Deputy Commissioner can fairly and reasonably draw a conclusion that the injury sustained by the appellee arose out of and in the course of his employment, and it is the contention of the appellant that the appellee produced no testimony covering this particular point, and that the Deputy Commissioner had no testimony upon which he could reasonably find that the injuries sustained by the appellee in this case arose out of and in the course of his employment, but the testimony clearly shows that the injury was sustained by reason of a fight brought on or caused by the personal animosity between the appellee Bridges and one Downey, and it is respectfully submitted that the lower Court erred in sustaining the motion to dismiss the bill of complaint filed herein by the appellant, and that the decree of said Court should be reversed, with costs.

CORNELIUS H. DOHERTY,
Attorney for Appellant, Hartford Accident and Indemnity Co.

No. 7490

Joseph W. Stinson
**In the United States Court of Appeals
for the District of Columbia**

APRIL TERM, 1939—SPECIAL CALENDAR

**HARTFORD ACCIDENT AND INDEMNITY COMPANY,
APPELLANT**

v.

**FRANK A. CARDILLO, DEPUTY COMMISSIONER, AND
RAY BRIDGES, APPELLEES**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUMBIA**

BRIEF FOR APPELLEES

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In the United States Court of Appeals for the District of Columbia

APRIL TERM, 1939—SPECIAL CALENDAR

No. 7490

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
APPELLANT,

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER, AND
RAY BRIDGES, APPELLEES

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEES

PRELIMINARY STATEMENT

On October 10, 1938, the appellee, Ray Bridges, was employed as a helper in the produce warehouse of the Sanitary Grocery Co., Inc., of Washington, D. C. (R. 7, 11, 12). On that date he was assaulted by Roy Downey, a checker, under whom Bridges worked as a helper (R. 11, 12). Subsequently Bridges filed with the appellee, Frank A. Cardillo, deputy commissioner, a claim for compensation

(1)

under the District of Columbia workmen's compensation law (R. 9). Based upon the evidence adduced at a hearing before the deputy commissioner on April 6, 1939, the deputy commissioner filed a compensation order on April 13, 1939 (R. 7, 8), in which he awarded compensation to Bridges upon finding that the injury sustained by him arose out of and in the course of his employment. The total aggregate amount of the award was \$51.62 (R. 8).

The sole question involved in this litigation appears to be whether the deputy commissioner properly found from the evidence that the injury sustained by Bridges arose out of and in the course of his employment, within the meaning of section 2 (2) of the compensation law (44 Stat. 1424, 1425, Chapt. 509; U. S. C., Title 33, Chapt. 18, Sec. 902 (2)); made applicable to the District of Columbia by the Act of May 17, 1928 (45 Stat. 600, Chapt. 612, Sec. 1; D. C. Code, Title 19, Chapt. 2, Sec. 11).

It is respectfully submitted that Mr. Justice Bailey of the District Court properly answered this question in the affirmative.

SUMMARY OF ARGUMENT

1. The findings of fact of the deputy commissioner, to the effect that the injury sustained by Bridges arose out of and in the course of his employment, are supported by competent evidence, and should, therefore, be regarded by the Court as final and conclusive.

2. The injury arose out of and in the course of Bridges' employment, because:

(a) the assault upon him occurred upon the industrial premises of the employer, during regular working hours, and at a time when Bridges was actually in the performance of his duties.

(b) Bridges was not the aggressor in the assault.

(c) the altercation arose out of the fact that Downey, Bridges' superior, provoked a situation of ill feeling by addressing Bridges by a term to which he had objected, viz: "Shorty," when instructing him to do his work. The injury was, therefore, incidental to, and arose out of, the employment.

ARGUMENT

General rules

The following general rules of compensation law appear to be applicable to this case:

1. The compensation law should be liberally construed in favor of the injured employee or his dependent family: *Baltimore & Philadelphia Steamboat Co. v. Norton, deputy commissioner*, 284 U. S. 408; *Fidelity & Casualty Co. of New York v. Barris*, 59 F. (2d) 1042, 61 App. D. C. 228; *DeWald v. Baltimore & O. R. Co.*, 71 F. (2d) 810 (C. C. A. 4); certiorari denied October 8, 1934, 293 U. S. 581.

2. In the absence of substantial evidence to the contrary, the presumption is "That the claim

comes within the provisions of this Act"; section 20 (a) of the Compensation Act.

3. The findings of fact of the deputy commissioner supported by evidence should be regarded as final and conclusive and not subject to judicial review; *Del Vecchio v. Bowers*, 296 U. S. 280 (1935); *Voehl v. Indemnity Insurance Company of North America*, 288 U. S. 162 (1933); *Hoage, deputy commissioner v. Employers Liability Assurance Corporation, Ltd.*, 64 F. (2d) 715, 62 App. D. C. 77 (1933), certiorari denied, 54 S. Ct. 54 (1933); *New Amsterdam Casualty Co. v. Hoage, deputy commissioner*, 62 F. (2d) 468, 61 App. D. C. 306 (1932), certiorari denied, 288 U. S. 608 (1933).

4. Logical deductions and inferences which may be and are drawn by the deputy commissioner from the evidence should be taken as established facts and are not judicially reviewable; *Michigan Transit Corporation v. Brown, deputy commissioner*, 56 F. (2d) 200 (D. C. Mich.); *Del Vecchio v. Bowers*, 296 U. S. 280; *Eastern Steamship Lines, Inc. v. Monahan, deputy commissioner, et al*, 21 F. Supp. 535 (D. C. Me.); *Grain Handling Co., Inc. v. McManigal, deputy commissioner*, 23 F. Supp. 748 (D. C. N. Y.); *Simmons v. Marshall, deputy commissioner*, 94 F. (2d) 850 (C. C. A. 9).

Findings of fact of deputy commissioner supported by competent evidence

The deputy commissioner found in the compensation order of April 13, 1939, the facts relating to

the assault upon Bridges, to be, in part, as follows (R. 7, 8):

that on the said day (October 10, 1938), the claimant herein, while employed as a helper in the employer's produce warehouse and engaged in loading vegetables on the employer's truck, sustained personal injury resulting in his disability when a co-worker assaulted him, suffering a laceration of the right eyebrow and a fracture of the right maxilla; * * * that the work performed by the claimant was supervised by a checker, Roy Downey; that in directing the claimant in the performance of his duties Downey addressed the claimant as "Shorty"; that the claimant resented being called "Shorty" and when Downey continued to so address the claimant, the latter called Downey a vile name; that Downey thereupon struck the claimant a blow on the right side of the face with his fist, inflicting the injuries above described; that the claimant did not strike or attempt to strike his superior, Downey; that Downey was the aggressor in the assault; that the injury had its origin in the employment and that it arose out of and in the course of the said employment.

It is submitted that the evidence narrated below is sufficient to support the findings of fact of the deputy commissioner complained of by appellant.

RAY BRIDGES, the injured employee, testified that in October 1938 he was employed by the Sanitary

Grocery Company as a helper in the company's warehouse at Fenwick and Oakie Streets, where vegetables and fruits were handled; that he helped to get up orders and also helped with the checking (R. 11, 12); that his immediate superior was Roy Downey; that he went to work on October 10, 1938, at 1:30 o'clock in the morning; that on that particular day he was engaged in loading vegetables and that Downey was in charge of the work; that around 4 o'clock that morning, *while loading a basket of kale on a truck*, Downey struck him from the back on the right side of the face; that he was stunned by the blow but finished loading the kale; that he then went to his boss, Mr. Frowenfellow, and reported the matter (R. 12, 13, 14); that Frowenfellow took him to see the company doctor and that he later went to Sibley Hospital (R. 14); that up to the time of the attack his relations with Downey had been friendly (R. 16); that the injury occurred on Monday and during the previous Saturday witness and Downey had "kidded" each other about their watches (R. 16); that on the morning of the injury Downey began "kidding" witness about his size; that witness told Downey that he could not help it about his size, "and I told him that I thought it was ignorant for a man to go on about a person's size. * * * and he (Downey) got angry"; that when he noticed that Downey was getting angry he "didn't say anything more up until he struck me" (R. 17); that horseplay or bantering

is a common thing among the employees at the warehouse and so far as witness knows the company has not done anything to put a stop to it; that Downey told witness "he (Downey) was fired one time for fighting at the warehouse" (R. 17, 18).

ROY EDWIN DOWNEY testified on behalf of the employer and insurance carrier, among other things, that on October 10, 1938, he was employed as a checker by the Sanitary Grocery Company and that Ray Bridges worked under him; that on that date he and Bridges kidded one another; that he called Bridges "Shorty" and that Bridges called him "Skinney," witness further testifying in substance that the reason he assaulted Bridges was that Bridges called him a "son of a bitch" (R. 28, 29); that he thereupon struck Bridges below the right cheek bone with his fist (R. 29, 31); that at the moment he struck Bridges, Bridges did not make any motion toward him (R. 31); that the whole thing started from *witness calling Bridges "Shorty"*; that there was *no discussion that morning relative to watches* (R. 32).

Downey further testified as follows (R. 32, 33):

Q. Were you ordering him to get something when you addressed him as "Shorty"?

A. Yes; I was telling him to get something, I would say, "Shorty, get a box of spinach," or I would say "Shorty, get a box of iceberg," or I would say, "Shorty, get a basket of spinach."

JOHN ROGERS, coemployee, testified on behalf of the employer and insurance carrier, and his testimony corroborates the testimony of Roy Downey (R 34, 39). With respect to the origin of the altercation, Rogers testified as follows (R. 38, 39):

Q. Would Downey say "Shorty, go get this," or "Shorty, go get that"?

A. Yes; and he would get it; not every time would he call him that, but sometime.

Q. Did he on that morning?

A. Yes, sir.

Q. Did you hear Downey ask Bridges to bring something over to him or to do something and when he would ask him to do those things he would call him "Shorty"?

A. Yes, sir.

Q. And this was just previous to the time that Bridges became angry?

A. Yes; just before he hit him, toward the last; yes.

Q. What did Downey order him to do on that particular occasion, do you recall?

A. No; I do not, but I think Bridges was getting a basket of kale before the two came together.

Q. What do you mean by that?

A. Well, I think Roy had called for a box of spinach or a box of kale.

Q. You think that Roy had asked Bridges to get a basket of kale or a basket of spinach?

A. Yes.

Q. And in doing so he had called him "Shorty"?

A. *Yes, sir.*

Q. That is what started this?

A. *Yes, sir.*

Injury sustained by Bridges arose out of and in the course of his employment

It is respectfully submitted that the evidence in this case clearly establishes:

1. That the assault upon Bridges occurred upon the industrial premises of the employer and during Bridges' regular working hours.

2. That at the time of the assault Bridges was actually engaged in the performance of his duties.

3. That Downey was the aggressor in the assault.

4. That the altercation arose out of the fact that Downey, *Bridges' superior*, provoked a situation of ill-feeling by calling Bridges "Shorty," which Bridges resented. It is a significant fact that Downey called Bridges "Shorty" *when instructing him to do his work.*

5. That there could be no doubt that the injury was sustained by Bridges *in the course of his employment.* When an injury is sustained in the course of the employment it will be presumed *to have arisen out of the employment*, in the absence of substantial evidence to the contrary. See section 20 (a) of the compensation law, and *Humphrey v. Tietjen & Steffin Milk Company*, 235 App. Div. 470; 257 N. Y. S. 768; affirmed 185 N. E. 733; 261 N. Y. 549.

The meaning of the words "in the course of" and "out of the employment" is a question that has been considered on numerous occasions by courts all over the country. Since these words, or a somewhat similar phrase, appear in almost every workman's compensation statute, it is not surprising that the meaning of these phrases has been the subject of considerable judicial discussion. Before considering the specific doctrines that have been evolved by the courts to apply to situations such as the instant one, certain general considerations should be kept in mind. It should frankly be recognized that in almost no field of workman's compensation law will there be a unanimity of court opinion. The multitude of cases and infinite variety of situations has inevitably produced a divergence in judicial opinion. For that reason it is necessary to discriminate carefully in choosing and evaluating conflicting precedents. Considerable weight, of course, must be given to opinions of the federal courts under the Longshoremen's Act, for that Act is also the Compensation Act of the District of Columbia. Furthermore, it should be kept in mind that the Longshoremen's Act was modeled, indeed taken almost verbatim, from the New York Workmen's Compensation Law. Accordingly, federal courts have repeatedly said that interpretations of the New York courts under the New York Workmen's Compensation Law, particularly those constructions rendered before the Longshoremen's

Act was adopted, are to be deemed incorporated into the Longshoremen's Act; for when Congress adopted the wording of the New York statute it must have approved all judicial constructions that had been made of that wording. On this point see *West Penn Sand & Gravel Co. v. Norton, deputy commissioner*, 95 F. (2d) 498 (C. C. A. 3).

In addition to the discrimination to be made between the opinions of various jurisdictions on the basis suggested above, one other basis of discrimination should be kept in mind. It should be remembered that the purpose of the workmen's compensation laws was to do away with the technical defenses available to the employer at common law, to do away with the conceptions of negligence, contributory negligence, assumption of risk, frolic, and detour—conceptions which materially impaired the right of an employee to recover for injuries that he sustained. Workmen's compensation legislation was designed to place on the industry the risk of injury to employees, and to provide employees with essentially an insurance against industrial accidents.

Since workmen's compensation legislation was remedial in nature, courts have unanimously adopted a rule of liberal construction in interpreting such legislation, and have adopted numerous other devices, such as presumptions that an injury arose out of and in the course of employment, to make the coverage of the statute as comprehensive

as possible. The reading of workmen's compensation cases discloses, for the most part, a conscious judicial effort to give the widest possible application to workmen's compensation statutes.

While almost all courts have paid lip service to the rule of liberal construction, there are some courts which have resurrected the common-law notions in the administration of workmen's compensation statutes. In accordance with the rule of liberal construction, greater weight should be given to the opinion of courts which consider the broad aspects of workmen's compensation legislation in deciding the legal issues which confront them.

An examination of the cases with these criteria in mind discloses that *Bridges* has an unmistakable right to recovery, for not only have the New York courts allowed recovery in similar situations—namely in cases where one workman assaults another—but those courts which have examined the basic principles of the right to recovery in such situations and which have considered those principles in the light of the purpose of workmen's compensation legislation have unanimously reached the conclusion that injuries suffered under circumstances similar to those in the instant case are compensable.

In the recent case of *Maryland Casualty Company v. Cardillo*, deputy commissioner, 69 App. D. C. 199, 99 F. (2d) 432, the so-called *Jennings* case, decided by this Honorable Court on September 19, 1938, it was held that an attack upon a cook in

a restaurant by a bus boy, a co-employee, was compensable, this Court saying:

The evidence supports the finding that the death arose out of the employment. This court has held that an unexplained attack upon a workman by a stranger, on the employer's premises, arose out of the employment. *Hartford Accident & Indemnity Co., v. Hoage*, 66 App. D. C. 160, 85 F. (2d) 417. A fortiori if, as here, a quarrel over work leads one employee to strike another, the resulting injury arises out of the employment. A long line of cases so hold. In some, the quarrel began with a lower servant's resentment of a higher servant's criticism. *Rydeen v. Monarch Furniture Company*, 240 N. Y. 295, 148 N. E. 527. But it is not necessary that either antagonist have authority over the other. *Pekin Cooperage Company v. Industrial Commission*, 285 Ill. 31, 120 N. E. 530; *Hinchuk v. Swift & Company*, 149 Minn. 1, 182 N. W. 622; *Verschleiser v. Stern & Son*, 229 N. Y. 192, 128 N. E. 126; *Farmers' Mfg. Co., v. Warfel*, 144 Va. 98, 131 S. E. 240. Accordingly nothing turns on the deputy commissioner's finding that Steadman was "a workman of lower rank" than Jennings; but that finding, like the others, is supported by evidence.

The decision of this Court in the *Jennings* case, *supra*, was cited with approval by the United States district court for the southern district of Texas, Galveston Division, in the recent case of *Southern Pacific Company v. Sheppard*, deputy

commissioner, the so-called *Gaffney* case, decided July 12, 1939, not yet reported, which arose under the Longshoremen's Act, and in which the Court said:

I think it is but a step farther to say that Gaffney was injured while and because he was employed as a longshoreman along with other negro longshoremen and *associated with conditions inseparable from a longshoreman's life, and that the risks of such associations* were the risks of the employment. [Italics supplied.]

A copy of the opinion in the *Gaffney* case will be found in the Appendix of the brief.

The principle justifying recovery in the present case was nowhere better stated than in the case of *Ferguson v. Cady-McFarland Gravel Company*, 156 La. 871, 101 So. 248 (1924). In that case while the claimant was shoveling gravel and filling in between the cross ties of a railroad track, and while in a stooping position, he was struck on the head with an iron instrument in the hands of a fellow employee. The Court declared that the injury was one arising out of and in the course of employment, and stated the broad basis of its holding in the following language:

The moment we begin to indulge in hair-splitting distinctions in cases of this kind, that moment we approach the danger line of reading into the statute the defense that the employee assumes the risks of his employment, a defense which the employer is

expressly prohibited from urging under the Employers' Liability Act against a claim for compensation by a workman (citation). Whether the employer, the employee, or the fellow employee is guilty of negligence or not is immaterial, so far as the liability of the employer is concerned.

* * * * *

As employment in gang work, such as decedent was engaged in, necessitates collaboration, the working together of the employees constitutes the nature of such employment, and the risk of assault and personal injury to the employee is to be viewed from that aspect. *Obviously, such risk is greater than it would be to a person not engaged in such employment because such person is not required to be constantly in the presence of an enemy, should he have one.* [Italics supplied.]

The principles set forth in this case have been repeatedly applied by the New York Court of Appeals in assault cases. Without any attempt to make an exhaustive survey of the New York cases or of the cases in other jurisdictions, we will discuss a few of the more typical cases, particularly those closely resembling the instant case. The case of *Carbone v. Loft*, 114 N. E. 1062, 219 N. Y. 646 (1916), is on all fours with the instant case. The facts in that case were described by the Court of Appeals as follows:

Claimant while employed in a factory became involved in a verbal exchange of

insulting language with a fellow employee, as a result of which the latter violently assaulted claimant three-quarters of an hour later. In defending himself from the assault claimant sustained injuries.

The Court of Appeals unanimously affirmed the award of compensation, and this case has been repeatedly cited and followed in subsequent New York cases. The present case is even stronger than the *Carbone* case, for here Bridges did not engage in the scuffle at all, whereas in the *Carbone* case the claimant sustained the injuries as a result of defending himself.

Again in the case of *Janchewsky v. E. W. Bliss Company*, 198 App. Div. 8, 189 N. Y. S. 154, the claimant was assaulted while "looking for his shoes and tools preparatory to beginning work that day." Recovery was granted under the doctrine of the *Carbone* case.

Another case almost identical with the instant case is that of *Grosberg v. H. & H. Taxi Corporation*, 250 App. Div. 804, 294 N. Y. Supp. 201 (3rd Department 1937). In that case the award of compensation was unanimously affirmed. The Court described the facts as follows:

Claimant was employed as a taxi driver by the employer, said employer being engaged in operating taxicabs. While in the employer's garage waiting to be assigned to a taxicab, a fellow employee accused claimant of being a "chiseler" and assaulted

claimant, whereby the injuries involved were sustained.

An even stronger case is that of *Wakefield v. World Telegram*, 249 App. Div. 884, 292 N. Y. Supp. 588 (1937). In that case the claimant was assaulted by an employee who was not working that day and who had come to the place of work completely intoxicated. The facts were described by the Court as follows:

Hugo Wakefield was employed by the World-Telegram to drive a delivery truck which was kept in the Excelsior Garage. When his day's work was finished, it was his duty to return the truck to the garage and, before placing it in its position, to drive it to a gasoline pump where it was filled with gasoline.

On the day of the shooting, while the deceased was in the seat of his truck and the truck was being filled with gasoline, he was shot by another employee of the World-Telegram who was not working that day but who had a day off and who had come to the garage completely intoxicated and had secured from his locker the revolver with which he shot the deceased. The accident arose out of and in the course of his employment. [Citing cases.]

In the case of *Humphrey v. Tietjen & Steffin Milk Co.*, 235 App. Div. 470, 257 N. Y. S. 768, decided May 26, 1932, affirmed 261 N. Y. 549, 185 N. E. 733, which arose under the New York workmen's

compensation law, the claimant and a coworker were employed at a milk factory; the coworker was a foreman in charge of the boiler room, and the claimant was "a man of all work." As part of his lunch the claimant brought into the boiler room several bottles of soft drink, and after having eaten his lunch, he placed the empty bottles near his dinner pail and returned to his duties. At the close of his work, and after returning to the boiler room for his dinner pail, he found that the foreman had broken the bottles and thrown them onto a coal pile. A dispute arose between the claimant and the coworker relative to the bottles, and the coworker reported the matter to the superintendent. Later in the same afternoon the coworker left the boiler room, of which he had charge, and went into the plant where the claimant was working and without either cause or explanation shot him twice. The Appellate Division of the New York Supreme Court, in reversing the Industrial Board, said in part as follows:

Upon these facts, shown by evidence that is credible, unimpeached, and uncontradicted, a question of law is present. And when an injury is *sustained in the course of the employment* it will be presumed as a matter of law *that it did arise out of the employment*, in the absence of substantial evidence to the contrary (Workmen's Compensation Law, section 21; *McQueeney v. Sutphen & Meyer*, 167 App. Div. 528). * * * We

are unable to discover any evidence to overcome this presumption, even though it did not appear from the record that the accident arose out of the employment; and we believe it does so appear. [Italics supplied.]

As can be seen from these cases, courts allow an employee who has been assaulted to recover compensation even though the cause of the assault had no direct relation to the employment. Illustrative of the broad scope of protection which courts have granted to employees is the case of *John H. Kaiser Lumber Company v. Industrial Commission*, 181 Wis. 513, 195 N. W. 329. In that case a lumber-camp employee was attacked by another employee occupying the same bunkhouse furnished them incidental to their employment. The employee committing the assault had become insane. The injury was held one growing out of the employment.

Courts have even allowed recovery in cases where the employee was not actually at work. In the case of *Willis v. State Industrial Commission*, 78 Okla. 216, 190 Pac. 92, the claimant was warming himself at a fire. Another employee threw some dynamite into the fire and claimant sustained injuries. Recovery was allowed. The instant case is considerably stronger, for Bridges was assaulted while in the course of performing his duties.

Indeed, courts have allowed recovery for assaults committed by complete strangers, even though those assaults had nothing at all to do with the claimant's

employment. Thus in the case of *Weinberg v. Eagle Clothes*, 243 App. Div. 826, 278 N. Y. Supp. 1 (1935), the Court said:

While en route to get his car to go down town on the business of the employer, within his working hours, he was assaulted by two unidentified men, causing the injury for which the award was made. The injury arose out of and in the course of his employment.

See also *Hartford Accident & Indemnity Co. v. Hoage, deputy commissioner*, 66 App. D. C. 160, 85 F. (2d) 417, which involved an attack upon a workman by a stranger.

Again the courts have allowed recovery for assaults even in cases where the claimant gave substantial verbal provocation for the assault. In the case of *Keyhea v. Woodward-Walker Lumber Co.*, 147 So. 830 (La. 1933), the deceased claimant was being transported back to a mill on a log train when he was shot by a fellow employee who was standing beside the track. The injury was held to be one arising out of the employment even though the deceased had told the killer that he would kill him when he returned from work.

The cases thus far discussed are cases of assault by one employee upon another, and it is clear that the instant case fits into that category. As has been noted, recovery is granted rather unanimously in this type of case, and it is therefore submitted that Bridges is entitled to recover for the assault

committed upon him. To be distinguished from the assault cases are the so-called horseplay cases. The assault cases are cases where one employee deliberately intends to injure the other; the horseplay cases those where the employees engage in a friendly physical encounter without an intent to injure. The more enlightened courts have treated the horseplay cases in the same fashion as the assault cases, but there are a good many courts which allow recovery in the assault cases, but restrict recovery in the horseplay cases.

Though we think it incontrovertible that the instant case fits into the classification of an assault, we think that recovery should be allowed even if it be regarded as a horseplay situation. Many courts have consistently allowed recovery in the horseplay cases. Recovery has been repeatedly allowed by the New York courts, and the reasons given for allowing recovery are, we believe, eminently sound and in accord with the fundamental principles of workmen's compensation legislation. The basis for recovery in this type of case is nowhere better stated than by the late Judge Cardozo, then of the New York Court of Appeals in *Leonbruno v. Champlain Silk Mills*, 229 N. Y. 470, 128 N. E. 711 (1920), wherein it was said:

The claimant's presence in a factory in association with other workmen involved exposure to risk of injury from the careless acts of those about him. * * * Whatever men and boys will do, when gathered to-

gether in such surroundings, at all events if it is something reasonably to be expected, was one of the perils of this service. We think with Kalisch, J., in *Hulley v. Moosbrugger*, 87 N. J. L. 103, 93 Atl. 79, 8 N. C. A. A. 283, that it was "but natural to expect them to deport themselves as young men and boys, replete with the activities of life and health. For workmen of that age or even of maturer years to indulge in a moment's diversion from work to joke with or play a prank upon a fellow workman, is a matter of common knowledge to everyone who employs labor." The claimant was injured, not merely while he was in a factory, but because he was in a factory, in touch with associations and conditions inseparable from factory life. The risks of such associations and conditions were risks of the employment.

* * * * *

The risks of injury incurred in the crowded contacts of the factory through the acts of fellow workmen are not measured by the tendency of such acts to serve the master's business. Many things that have no such tendency are done by workmen every day. * * * The test of liability is the relation of the service to the injury, of the employment to the risk.

Again, in the well-considered opinion of *Verschleiser v. Stern and Company*, 229 N. Y. 192, 128 N. E. 126 (1920), the Court allowed recovery. In that case a fellow employee "dropped a piece

of flesh about two feet long around the neck of the claimant. * * * The claimant resented the insult and assault upon him, and, in his excitement, believing the attack to have been made by Dudler (a fellow employee), went over to him and struck him several times with the piece of flesh, and then threw it down. Dudler thereupon kicked the complainant, causing the injuries complained of." The instant case is a much stronger one for recovery, for here Bridges did not participate in the physical encounter.

This type of case has rarely been presented to the Federal courts under the Longshoremen's Act. In a case closely resembling the instant one, that of *West Penn Sand & Gravel Company v. Norton*, 95 F. (2d) 498 (C. C. A. 3, 1938), recovery was allowed. In that case the claimant was engaged in unloading certain equipment from a barge owned by the employer. The barge was being unloaded by crane and during the intervals when the crane swung to the shore the men on the barge had no active duties to perform other than to be ready to attach another load to the crane. In one of these intervals, Mike Diklich, a friend of Donne's, playfully threatened to throw Donne into the river and started a friendly scuffle. In the course of this "horseplay" both men fell into the river and were drowned. The Court said in part:

The only finding of fact made by the Commissioner with which the appellants take issue, is that Donne "merely resisted the

attack of his coemployee and did not participate in the horseplay.”

The Court adopted the interpretation of the New York courts and declared that an employee injured through horseplay could recover, particularly when the horseplay was initiated by another employee.

In addition to the above-cited cases, see *Stasmas v. State Industrial Commission*, 195 Pac. 762, 80 Okla. 221; *Chicago R. I. & P. Ry. Co. v. Industrial Commission*, 123 N. E. 278, 288 Ill. 126, certiorari denied, 250 U. S. 670; *American Steel Foundries v. Melinik*, 126 N. E. 33, 74 Ind. App. 617; *Kansas City Fibre Box Co. v. Connell*, 5 F. (2d) 398; *General Accident Fire and Life Assur. Corp., Ltd. v. Crowell, deputy commissioner*, 76 F. (2d) 341 (C. C. A. 5); *Farmers' Mfg. Co. v. Warfel*, 131 S. E. 240, 144 Va. 98 (Va. 1926).

While we think that the instant case is to be governed by the doctrines applied in the assault cases, we feel that even under the doctrines evolved to govern the horseplay cases recovery should be allowed. It is true that the rule enunciated in the horseplay cases just discussed is not unanimous, but a rule that has been adopted by the New York courts, and by those federal courts which have considered the problem, should be the controlling rule. Furthermore, we submit that this rule has sound principle behind it and is in accord with the liberal interpretation which has traditionally been given to workmen's compensation legislation.

Even those courts which do not always allow recovery in horseplay cases have enunciated the doctrine that recovery will be allowed where the claimant is not the aggressor. See, for example, *Pekin Cooperage Company v. Industrial Board*, 277 Ill. 53, 115 N. E. 128. Aggression as used by those courts means physical aggression, and here Downey clearly precipitated the physical attack on Bridges. So far as we have been able to determine, there has never been any suggestion that mere engagement in banter can be considered aggression or participation in horseplay. But even if some court propounded the strange doctrine that the use of words might be considered aggression, in this case the banter was initiated by Downey, so that under no conceivable interpretation could Bridges be considered the aggressor. It is clear that the right of recovery cannot be clouded by the claimant's return of banter directed at him. Any such doctrine would ignore the facts of industrial life, for where a number of employees work together banter is customary and it is impossible for any employee to maintain an aloof silence. When the case of *Keyhea v. Woodward Walker Lumber Company*, discussed supra, is considered, it becomes clear how abortive would be any attempt to deny recovery to Bridges. In that case the claimant was allowed to recover even though he had previously threatened to kill his attacker. That holding makes the exchange of words by Bridges seem trivial indeed.

Again those courts which normally refuse recovery in horseplay cases have evolved another exception. Where the employer or his representative has knowledge that horseplay has been going on, it is held that recovery may be obtained. This case can be called a horseplay case only if the banter be regarded as horseplay. But the adoption of that very tenuous assumption carries its own rebuttal under the facts of the instant case, for in this case the banter—the conduct relied upon to bring this case within the horseplay category—was a common thing among the employees at the warehouse (R 18, 27). Under such circumstances, it is well established that recovery is allowed.

AUTHORITIES RELIED UPON BY APPELLANT

The authorities relied upon by appellant in this case do not appear to be in point. The case of *Wimmer v. Hoage*, 67 App. D. C. 128, 90 F. (2d) 373, cited on page 9 of appellant's brief, involved the question of compensability of an injury sustained by an *intoxicated* automobile salesman who was assaulted by a stranger while "in search of cigarettes for the personal gratification of himself and his companion." The deputy commissioner rejected the employee's claim in this case, and this Court affirmed the compensation order rejecting the claim.

In *Griffin v. Robertson*, 162 N. Y. Supp. 313 (1916), cited on page 9 of appellant's brief, the claimant, one Griffin, was accidentally struck by a

rail which another employee was handling, whereupon he became angry and kicked his fellow employee and was by the latter shoved against a box and injured. The Court held that Griffin's injury did not arise out of his employment because he "was the aggressor" and became angry over a slight and unimportant incident, the Court saying that "It was nothing more or less than the gratification of his personal feelings of animosity."

The case of *Goldhirsch v. American Character Doll Company*, 238 N. Y. S. 519 (1930), referred to on page 11 of appellant's brief, did not involve a claim for compensation. The purpose of the action in this case was to recover damages for personal injuries, the contention being "that the forum for relief is not this Court, but the State Industrial Board." A motion to dismiss the complaint was granted because the cause of action was badly pleaded and had to be amended. The quotation on page 11 of appellant's brief from the opinion in this case is in the nature of *obiter dictum*.

In *Hertz v. Ruppert*, 218 N. Y. 148, 112 N. E. 750 (1916), referred to on page 11 of appellant's brief, the award to the injured employee was affirmed. This case does not appear to support the contentions of appellant, but rather those of appellees.

The case of *Edelweiss Gardens v. Industrial Comm.*, 290 Ill. 462, 125 N. E. 260 (1919), cited on page 11 of appellant's brief, involved an injury to one Brill, a waiter in a restaurant, which was inflicted by reason of an assault upon him by a co-

worker, one Lee, a bus boy. Brill and Lee had no connection with or authority over each other in the discharge of their respective duties. In the present case, Bridges was assaulted by his superior, Roy Downey. Moreover, this case was decided in 1919, and the ruling of the Court appears to be contrary to the decision of this Court in the case of *Maryland Casualty Company v. Cardillo, deputy commissioner*, 69 App. D. C. 199, 99 F. (2d) 432.

The case of *Kimbrow v. Black and White Cab Co.*, 50 Georgia Apps. 148, 177 S. E. 274 (1934), referred to on page 11 of appellant's brief, is not in point, as will be seen from the following quotation from the opinion in that case:

Under claimant's evidence a finding that he was brutally assaulted without cause by the other driver, and that he received an injury during the course of his employment, would have been authorized. However, in finding against the claimant, the single commissioner found as a matter of fact that the claimant was injured in a personal altercation between himself and his coemployee, during which he was the aggressor * * *. There was evidence to support this finding; and the trial judge did not err in affirming the same.

It is significant to note that the cases cited by appellant, except the *Wimmer* case, the *Goldhirsch* case, and the *Kimbrow* case, were decided *some twenty years ago* at a time when liberality of construction of workmen's compensation laws had not become firmly established.

CONCLUSION

This survey of the cases has shown that the instant case falls within the groove of an attack by one employee on another, and that under such circumstances recovery is allowed rather uniformly. It has further shown that even if this case be deemed a case of horseplay, recovery should be allowed. Even those courts which normally deny recovery in horseplay cases would allow recovery, when, as here, the claimant was not the aggressor, and when, moreover, the employer was aware of the prevalence of horseplay. And, more important, the most significant and best considered cases customarily allow recovery in horseplay cases. Not only does the allowance of recovery have behind it opinions of the New York courts and of the federal courts under the Longshoremen's Act, but it is supported by the basic principles of workmen's compensation and by a liberal interpretation of workmen's compensation legislation. Even more significant than the support of recovery by the New York and federal cases are the sound principles enunciated in those cases, some of which we have quoted during the course of this brief. We think that it may safely be said that under established and well-considered doctrine the injury suffered by Bridges is compensable under the statute as an injury arising out of and in the course of employment.

In view of the foregoing, it is respectfully urged that the decree of the lower court dismissing the bill

of complaint was entirely proper and should be affirmed.

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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF TEXAS, GALVESTON
DIVISION

A. D. No. 1692

SOUTHERN PACIFIC COMPANY, LIBELLANT

v.

G. SHEPPEARD, DEPUTY COMMISSIONER, RESPONDENT

Armstrong, Cranford, Barker & Bedford, of
Galveston, Texas, for Libellant.

Clarence S. Eastham, of Houston, Texas, and
Randolph Pierson, of Galveston, Texas, for Inter-
venors.

Douglas W. McGregor, U. S. District Attorney,
and Eugene J. Wilson, Assistant U. S. District
Attorney of Houston, Texas, for Respondent.

July 12, 1939

FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER
ADMIRALTY RULE 46 $\frac{1}{2}$

STATEMENT OF THE CASE

This is a suit in admiralty by Libellant under
Section 921, Title 33, U. S. C. A., against G. Shep-
peard, Deputy Commissioner of the Eighth Com-

pensation District of the United States, to set aside an award made by such Commissioner under the Longshoremen's and Harbor Workers' Compensation Act (Sections 901 to 950, Title 33, U. S. C. A.) in the matter of the claim of Veola Gaffney, surviving wife of Bennie Gaffney, deceased, and of Robbie Lee Gaffney and Viree Gaffney, minor children of Veola Gaffney and Bennie Gaffney, for compensation under such Act, because of the death of Bennie Gaffney on or about October 26, 1938, claimed to have been caused by an injury received by him on October 18, 1938, while performing labor for the Libellant on the Steamship "El Valle." Veola Gaffney, individually and as next friend of such minors, have by permission of the Court intervened.

Libellant under such Act (Section 921, Title 33, U. S. C. A.) prayed for a stay of payment of the amount of the award, and the hearing on the matter of stay was set for June 30, 1939. At such hearing, at which Proctors for Libellant, Proctors for the Deputy Commissioner, and Proctors for the Intervenor were present, it was agreed in open Court that the case be forthwith submitted to the Court on the merits, and that pending the decision of the Court on the merits, the status quo of all matters should be preserved.

FINDINGS OF FACT

(a) I adopt the Findings of Fact of the Commissioner, which I think are well supported by the evidence. The material portions thereof are as follows:

That on the 18th day of October 1938, Bennie Gaffney was an employee in the serv-

ice of Southern Pacific Company in Galveston in the State of Texas in the Eighth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act; and that on October 18, 1938, Southern Pacific Company was a qualified self-insurer as provided in Section 32 of the Longshoremen's and Harbor Workers' Compensation Act.

That on the 18th day of October 1938, Ernest Baugh, Bennie Gaffney, Walter Chassion, John Mattox, Wesley Holmes, and others were employed as longshoremen in the service of the Southern Pacific Company on board the steamship *El Valle*, which said vessel was then in the harbor of Galveston, Texas, in navigable waters of the United States.

That on the 18th day of October 1938, after the work of stowing flour on board the steamship *El Valle* had been in progress for approximately one hour, a quarrel or verbal altercation arose between Bennie Gaffney, Wesley Holmes, and John Mattox in the following manner:

Bennie Gaffney retired to the wing of the ship for the purpose of repairing or readjusting some part of his clothing. Wesley Holmes, thinking that Gaffney was taking too much time out, called to him to go back to work. Gaffney replied with a vile epithet, calling Holmes a filthy name. At that point John Mattox intervened on behalf of Wesley Holmes and said to Gaffney: "Wesley is right; if you come on in and go to work, it makes the work easy." Gaffney then began to curse Mattox—told him to do an indecent thing—and in return he received from Mattox a reply expressed in language of a like degree of repulsiveness. From then on Mat-

tox and Gaffney continued to address each other in vile, repulsive, repugnant, and provocative language, each telling the other to kiss his anatomy on an indecent and humiliating part, even going so far as to include their womenfolk in their abusive verbal combat, and that, too, in uncomplimentary, indecent, vulgar, and obscene terms. The climax was finally reached, with Gaffney having the last word of the quarrel when he addressed Mattox in the following language: "If it was left with me, I would kill a black son of a ——— every morning for breakfast." By that time Gaffney had returned to his post of duty and was engaged in stowing 100-lb. sacks of flour—had helped to handle five or six sacks and was attempting to lift another sack—when John Mattox struck him twice on the head with a piece of timber, which caused him to sustain a severe personal injury; to wit, fracture of the skull with intracranial hemorrhage.

That the quarrel between Bennie Gaffney, Wesley Holmes, and John Mattox had its origin in and grew naturally out of the conditions of their employment, and the abusive language used by the participants, the exchange of vile epithets which culminated in the fatal blows dealt Bennie Gaffney at the hands of John Mattox, was but a continuation of that quarrel.

That in the course of the quarrel or verbal altercation Bennie Gaffney did not engage John Mattox in physical combat and made no attempt to do so.

That on the 18th day of October 1938, Bennie Gaffney sustained an accidental injury while in the furtherance of his employer's business, and at the time he received the fatal blows he was actually engaged in the work assigned him to do.

That the injury Bennie Gaffney sustained on October 18, 1938, which caused his death on October 26, 1938, arose out of and in the course of his employment in the service of Southern Pacific Company on board the steamship "El Valle" in the harbor of Galveston, Texas.

That on the 26th day of October 1938, Bennie Gaffney died as a result of an accidental injury he sustained on October 18, 1938, while employed in the service of Southern Pacific Company on board the steamship "El Valle" at Galveston, Texas.

(b) The Commissioner concluded that under the facts, Intervenor was entitled to an award, and awarded death compensation under Act (Section 909, Title 33, U. S. C. A.).

(c) The sole complaint of Libellant is found in Paragraph 7 of its Libel, reading as follows:

That the award is erroneous and not in accordance with law in each or any or all, singularly or collectively, for the following reasons, to wit:

(a) There is no evidence to support the finding of the Commissioner that the injury sustained on October 18, 1938, which caused his death on October 26, 1938, arose out of his employment in the service of the libellant, Southern Pacific Company.

(b) The undisputed evidence shows that Bennie Gaffney's injury and death was caused by a blow on the head, struck by a co-employee, John Mattox, in a sudden rage, which Bennie Gaffney provoked by cursing and abusing the said John Mattox, and by using violently abusive language to the said John Mattox, concerning the said John Mattox and concerning the wife and mother of the said John Mattox, and did not arise out of his employment.

1. Subdivision 2 of Section 902, Title 33, U. S. C. A., which defines an injury under such Act, is as follows (*italics mine*):

The term "injury" means *accidental injury or death arising out of and in the course of employment*, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

The applicable portion of Section 903, Title 33, is as follows:

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State Law.

* * * * *

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

Section 920, of Title 33, is as follows:

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

This Act is to be liberally construed. *B. & P. S. S. Co. v. Norton*, 284 U. S. 408, 76 L. Ed. 366. If the fact findings of a Deputy Commissioner under such Act are supported by evidence, they are final. *Crowell v. Benson*, 285 U. S. 22, 76 L. Ed. 598. It is difficult to say whether the last three paragraphs (underscored) of the Commissioner's Findings of Fact are findings of fact or whether they are conclusions of law from facts. Whichever they may be, I think they are right and should be approved and upheld.

The facts show three employees (Bennie Gaffney, John Mattox, and Wesley Holmes) were involved in the quarrel which led up to the injury to Gaffney. The quarrel arose between Gaffney and Holmes because Gaffney left the work in hand longer than Holmes thought he should. Mattox took up Holmes' quarrel saying to Gaffney, "Wesley (Holmes) is right; if you come on in and go to work, it makes the work easy." The quarrel was over work. At the climax of the quarrel when Mattox struck Gaffney, causing the injury and his subsequent death, Gaffney had several minutes before returned to work and was working.

I think it is the Law that if a quarrel over work leads one employee to strike another, the resulting injury arises out of employment within the meaning of the Act. *Maryland Casualty Co. v. Cardillo*, 99 Fed. (2d) 432, and other similar cases. Citing

Early-Stratton Co. v. Rollison, 156 Tenn. 256, 300 S. W. 569, and referring to many other cases, the Circuit Court of Appeals of this (Fifth) Circuit, in *Aetna Life Ins. Co. v. Windham*, 53 Fed. (2d) 984, a Workmen's Compensation Case where an employee was assaulted by a representative of his employer, uses this language:

In Texas (*Lumberman's Reciprocal Ass'n v. Behnken*, 112 Tex. 103, 246, S. W. 72, 28 A. L. R. 1402; *Constitution Indemnity Co. v. Shytles* (C. C. A.) 47 F. (2d) 441; *Standard Accident Ins. Co. v. Stanaland* (Tex. Civ. App.) 285 S. W. 878), as in other states having workmen's compensation laws, these statutes are liberally construed to give effect to the remedial purpose of the law. Though of course an injury is not compensable unless it results from a risk or hazard incident to the conduct of such work or business, it is uniformly held that those risks and hazards are incident to the business which arise in the course of it, and out of or in connection with its activities, even though the hazards are themselves unusual and not normally to be expected. In this view fights between workmen over the manner, or while in the course, of doing work, quarrels between the foreman and employees arising in the same way, and particularly disputes and difficulties arising over attempts to reprimand or discharge workmen for their conduct while about, or in the manner of doing, their employer's work, are covered and injuries resulting are compensable. *Early-Stratton Co. v. Rollison*, 156 Tenn. 256, 300 S. W. 469, 570.

Then too in *Leonbruno v. Champlain Mills*, 229 N. Y. 470, 128 N. E. 711, 13 A. L. R. 522, the injured man (an employee) was injured by an apple

thrown in sport by another employee at another. Judge Cardozo there said:

We think with Kalisch, J., in *Hully v. Moosbrugger*, 87 N. J. L. 103, 93 Atl. 79, 8 N. C. C. A. 283, that it was "but natural to expect them to deport themselves as young men and boys, replete with the activities of life and health. For workmen of that age, or even of maturer years, to indulge in a moment's diversion from work to joke with or play a prank upon a fellow workman, is a matter of common knowledge to everyone who employs labor." The claimant was injured, not merely while he was in a factory but because he was in a factory, in touch with associations and conditions inseparable from factory life. The risks of such associations and conditions were risks of the employment. *Thom v. Sinclair, supra*; *Redner v. H. C. Faber & Son*, 223 N. Y. 379, 119 N. E. 842.

I think it is but a step farther to say that Gaffney was injured while and because he was employed as a longshoreman along with other negro longshoremen and associated with conditions inseparable from a longshoreman's life, and that the risks of such association were the risks of the employment.

The stay prayed for is denied, and the award of the Deputy Commissioner is affirmed.

T. M. KENNERLY, *Judge*.